No. 15,818

In the United States Court of Appeals for the Ninth Circuit

PACIFIC GAMBLE-ROBINSON CO., a Corporation
APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

On Appeal from the Judgment of the United States District Court for the Western District of Washington

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BRIEF FOR THE APPELLEE

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INDEX

CITATIONS

Cases:

Statutes:

Miscellaneous:

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OPINION BELOW

The oral opinion, findings of fact and conclusions of law of the District Court (R. 48-62) are not officially reported.

JURISDICTION

This appeal involves federal transportation taxes for the period July, 1950, through November, 1950, during which period the taxes in dispute in the amount of $78,937.17 were paid. (R. 52-53.) Fifteen claims for refund were filed on June 28, 1954

(R. 59), one was rejected on December 23, 1954, one on April 11, 1955, and the remainder on October 6, 1955 (R. 59-60). Within the time provided in Section 3772 of the Internal Revenue Code of 1939, and on December 17, 1956, the taxpayer brought an action in the District Court for the recovery of the taxes paid. (R. 3-24.) Jurisdiction was conferred on the District Court by 28 U.S.C., Section 1346. The judgment was entered on September 16, 1957. (R. 63-64.) Within sixty days and on November 8, 1957, a notice of appeal was filed. (R. 64.) Jurisdiction is conferred on this Court by 28 U.S.C., Section 1291.

QUESTION PRESENTED

Taxpayer paid freight charges for transportation of property solely within the United States by carriers within the United States, by means of checks drawn in the United States on banks in the United States. The checks were mailed to Canada and there manually delivered to the offices of the carriers located outside the United States in an attempt to avoid the transportation tax. The question is whether taxpayer is not required by Section 3475(a) of the Internal Revenue Code of 1939 to pay transportation taxes on such payments despite the unusual method by which they were made.

STATUTE INVOLVED

Internal Revenue Code of 1939:

> SEC. 3475 [As added by Sec. 620(a), Revenue Act of 1942, c. 619, 56 Stat. 798]. TRANSPORTATION OF PROPERTY.

(a) *Tax.*—There shall be imposed upon the amount paid within the United States after the effective date of this section for the transportation, on or after such effective date, of property by rail, motor vehicle, water, or air from one point in the United States to another, a tax equal to 3 per centum of the amount so paid, except that, in the case of coal, the rate of tax shall be 4 cents per short ton. Such tax shall apply only to amounts paid to a person engaged in the business of transporting property for hire, including amounts paid to a freight forwarder, express company, or similar person, but not including amounts paid by a freight forwarder, express company, or similar person for transportation with respect to which a tax has previously been paid under this section. In the case of property transported from a point without the United States to a point within the United States the tax shall apply to the amount paid within the United States for that part of the transportation which takes place within the United States. The tax on the transportation of coal shall not apply to the transportation of coal with respect to which there has been a previous taxable transportation.

* * * *

(26 U.S.C. 1952 ed., Sec. 3475.)

STATEMENT

This case was tried upon the pleadings (R. 3-31), and a written stipulation of facts supported by various exhibits (R. 31-48). There is no controversy about the facts which are as follows:

The appellant (hereafter taxpayer), Pacific Gamble-Robinson Co. is a Delaware corporation with its principal place of business in Seattle, Washington. It is engaged in the wholesaling of fresh fruits and vegetables and processed food stuffs in the United States, as well as through subsidiaries in Canada. Its main offices were maintained at Seattle, Washington, and at Minneapolis, Minnesota, and it had branch offices elsewhere within the United States. (R. 51-52.)

During the period July through November, 1950, taxpayer received freight bills from various railroad companies in the United States. These bills represented charges incurred by taxpayer upon the transportation of produce and other property upon the rail lines of the railroads from one point in the United States to another between June 30 and October 31, 1950. (R. 52.)

This transportation was mainly in interstate commerce, although a small amount was intrastate, and all payments herein mentioned were made to railroad companies regulated by the Interstate Commerce Commission. Under the regulations of that Commission the freight bills were required to be paid within 96 hours of receipt, and in each instance they were paid within that time. Each of the railroad companies concerned maintained offices at various places in the United States, including Seattle and Minneapolis and other cities at which taxpayer maintained branch offices, at which the freight bills could have been paid. They also maintained offices in Canada. (R. 53.)

During the period in question taxpayer paid freight bills aggregating $2,605,012.47, together with the three percent tax imposed by Section 3475(a) of the Internal Revenue Code of 1939, as added, in the amount of $78,937.17 which taxpayer was required to pay by the railroad companies. (R. 53.) These charges plus tax were paid as follows:

(a) Taxpayer's Seattle office drew checks upon its accounts in two Seattle banks, payable to the railroad companies in amounts totalling $812,810.10 for freight and $25,164.28 for transportation tax. These checks were mailed to representatives of taxpayer in care of a subsidiary of taxpayer. These representatives delivered the freight bills and checks to duly authorized agents of the railroad companies during regular business hours at their offices in Vancouver, B.C. (R. 54-55.) The salaries of these representatives were paid in part by taxpayer's subsidiary, by whom they were employed, and in part by taxpayer. The above described functions were the only functions which they performed for taxpayer. (R. 56.)

(b) Taxpayer's Minneapolis office drew checks upon its account in a Minneapolis bank, payable to the railroad companies in amounts totalling $1,620,-321.98 for freight and $48,619.11 for transportation taxes. These checks were mailed to one McGibbon in Winnipeg, Manitoba. He was employed and paid by taxpayer for the sole purpose of paying the freight bills. McGibbon delivered the freight bills and checks to the agents of the railroad companies during their

regular business hours at their offices in Winnipeg. (R. 56-57.)

(c) Taxpayer's Minneapolis office also drew checks upon its account in a Minneapolis bank, payable to the railroad companies in amounts totalling $171,-880.39 for freight and $5,153.78 for transportation taxes. These checks were mailed to Peter McKercher in Toronto, Ontario. He was an employee of a subsidiary of taxpayer with offices in Toronto, and his salary was paid by the subsidiary. McKercher delivered the freight bills and checks to the agents of the railroad companies at their Toronto offices. (R. 57-59.)

In each of the above-described situations the agents of the railroad companies accepted the checks in the various Canadian cities, marking them with an ink stamp showing the word "Paid", or words to similar effect, the date, and the location of the agent's office in Canada. The agents then returned the receipted bills to taxpayer's representatives. In each instance the tax so collected was paid by the railroad company concerned to the Collector of Internal Revenue in the district in which it had its principal place of business. In due course the checks were presented to the bank upon which they were drawn and were honored by it. (R. 55-59.)

Taxpayer filed claims for refund for the taxes paid and each claim was disallowed. (R. 59-60.) Thereupon this action for refund was commenced, and judgment entered in favor of the United States. (R. 63-64.) From such judgment the taxpayer here appeals. (R. 64.)

SUMMARY OF ARGUMENT

The issue in the present case is identical and the basic facts are essentially the same as those considered by the Court of Claims in *Kellogg Co.* v. *United States*, 133 F. Supp. 387 (C. Cls.), certiorari denied, 350 U.S. 903, and those presently pending before this Court for rehearing in *Fisher Flouring Mills Co.* v. *United States*, No. 15,819, and *Albers Milling Co.* v. *United States*, No. 15,869. For the reasons which are more fully developed in our brief in the *Fisher Flouring Mills* case, the decision of the District Court is correct and should be affirmed.

ARGUMENT

Taxpayer Is Required By Section 3475(a) of the Internal Revenue Code of 1939 To Pay Transportation Taxes On Shipments of Property Which Were Made Entirely Within the United States, Payments for Which Were Purportedly Made By Unusual Methods Across the Border In Canada for the Sole Purpose of Avoiding These Taxes

The case at bar presents a factual pattern almost identical to that in *Kellogg* v. *United States*, 133 F. Supp. 387 (C. Cls.), certiorari denied, 350 U.S. 903 and likewise almost identical to that in *Fisher Flouring Mills Co.* v. *United States*, No. 15819, and *Albers Milling Co.* v. *United States*, No. 15869, both of which are presently pending before this Court for rehearing. In our brief in the *Fisher Flouring Mills* case we have discussed at length the *Kellogg* decision and have set forth reasons in support of our position that that decision correctly interpreted the provisions

of Section 3475(a), *supra*, of the Internal Revenue Code of 1939. For the same reasons therein set forth, the judgment of the District Court in this case is correct and should be affirmed.[1]

In this case, as in the others above mentioned, all of the transportation for which the freight bills were paid took place within the United States. Railroad companies in the United States sent the bills to various offices of the taxpayer located within the United States. Then the freight bills were paid by taxpayer drawing checks, in the United States, upon banks located within the United States. These checks were next mailed to representatives of taxpayer in various Canadian cities who then presented them to agents of the railroad companies. Under these facts we submit to this Court that the mere fact of mailing the checks to Canada and there delivering them to agents of the carriers does not make these amounts fall outside the statutory language, "paid within the United States", as set forth in Section 3475(a) of the Internal Revenue Code of 1939. Indeed, the Government contends that this taxpayer's checks, drawn in every instance on its accounts with banks in the United States, and which would have to be returned to the United States ultimately for payment, did constitute within the meaning of the statute payment

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[1] To avoid unnecessary repetition and printing expense copies of the Government's brief in this Court in *Fisher Flouring Mills Co.* v. *United States* are being served simultaneously with this brief upon this taxpayer's counsel and the arguments contained in that brief are here incorporated by reference.

"within the United States". See *Kellogg* v. *United States, supra.*

Section 607 of the Revenue Act of 1950, c. 994, 64 Stat. 906, amended Section 3475(a) with which we are here concerned. When Congress amended this section, it did so with the understanding that it was clarifying, rather than changing, the existing law so far as abnormal situations such as that involved in this record are concerned. See S. Rep. No. 2375, 81st Cong., 2d Sess., p. 25 (1950-2 Cum. Bull. 483, 502), set forth at p. 14 of our *Fisher* brief. As to such abnormal situations, of course, which Congress considered covered by existing law, no need for retroactive amendment was present. The rare instance, however, where payment would have been made outside the United States in the ordinary course of business was not covered and Congress desired to change the law in this respect. Recognizing that it was making this limited change, it therefore enacted subsection (c) providing that the amendments made by Section 607 were applicable to amounts paid on or after November 1, 1950. The failure of Congress to amend Section 3475(a) retroactively, far from supporting the position of the taxpayer, detracts from it. Congress, as evidenced by the legislative history of the amendments, did not believe that it was changing the existing law with respect to the transportation of property of the type here involved. In such a posture, it would have been performing a useless rite in making retroactive an amendment which it felt did not change the statute. On the other hand, recognizing that it was changing the law

in a situation, for example, where a Canadian corporation incurred shipping costs for transportation solely within the United States, it desired to set a specific date in the future on which such a change would become effective.

The peculiar and artificial course of conduct followed by each of the taxpayers in these cases points up the weakness in their cases.[2] Only by construing the legislative words "within the United States" in a completely inert sense, without any consideration of the balance of the statute, can their position be sustained. The Court of Claims in *Kellogg* and the District Courts in this case, in *Albers* and in *Fisher* have each refused to interpret the statute in a manner which would provide for its self-nullification. This interpretation is correct and in accord with the basic purposes of the statute.

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[2] It should be noted that each taxpayer entered upon this unusual method of paying its freight bills after there was published and well-publicized notice of the viewpoint of the Revenue Service that such methods would not provide exemption from tax. See Treasury Release S-2389 set forth in fn. 3 of our *Fisher* brief.

CONCLUSION

The decision of the District Court in this case was correct and it should be affirmed.

Respectfully submitted,

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